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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
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Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

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Federal Communications Commission
Office of Secretary

COMMENTS OF THE COMPTEL/ASCENT ALLIANCE

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COMMENTS OF THE COMPTEL/ASCENT ALLIANCE

CompTel/ASCENT ("CompTel"), by its attorneys, hereby submits comments in response to the Commission's *Order and Notice of Proposed Rulemaking* (FCC 04-179) released in the above-captioned proceeding on August 20, 2004. In this proceeding, the Commission proposes to address numerous issues involving unbundled network elements ("UNEs") under Sections 251 and 252 of the Telecommunications Act of 1996 ("1996 Act"), including issues on remand from the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"). In *USTA II*, the Court upheld in part, and reversed in part, the UNE rules adopted by the Commission last year in the *Triennial Review Order*, 18 FCC Rcd 16978 (2003).

CompTel supports the "Comments of the PACE Coalition, Broadview Networks, Grande Communications, and Talk America, Inc." [hereinafter "UNE-P Coalition"], as well as the "Initial Comments of Advanced Telcom, Inc., Birch Telecom, Inc., Broadview Networks, Inc., Eschelon Telecom, Inc., Grande Communications, Inc., KMC Telecom, Inc., NuVox, Inc., SNiP LiNK, LLC, Talk America, Inc., Xspedius Management Co. LLC, and XO Communications, Inc." [hereinafter "Loop-Transport Coalition"]. In addition, CompTel is a sponsor of a report entitled "Analysis of State Specific Loop and Transport Data" by QSI Consulting, Inc., which is being submitted today in the above-captioned proceeding under separate cover.

CompTel is filing the instant comments to address selected issues in the above-captioned proceedings. To the extent CompTel does not address an issue specifically in these comments, CompTel supports the position taken on the issue by the UNE-P Coalition and the Loop-Transport Coalition.

I. INTRODUCTION AND SUMMARY

This Commission's legacy in the telecommunications industry will be established based on what it does in this proceeding. CompTel urges the Commission to act in the best interests of U.S. consumers by promoting all forms of UNE-based entry as Congress desired when it adopted Sections 251 and 252 of the 1996 Act. If the Commission further pares the mandatory UNE regime, it will cripple local telephone competition in the United States. CompTel urges the Commission to let its decisions be guided by the record evidence, not inchoate assumptions about preferred judicial outcomes or predictions on possible revisions to the 1996 Act in Congress next year. The competitive local exchange carrier ("CLEC") industry today is presenting compelling evidence that CLECs are impaired without access to, among other things, high-capacity loops and transport as well as mass market switching. If the Commission ignores this evidence and de-lists one or more of these critical UNEs, it will go down in history as having inflicted more harm on more consumers than any previous Commission.

The easy part of the Commission's task on remand is to re-adopt the impairment standard from the *TRO*. This standard remains fully valid today, and it was not questioned by the *USTA II* Court in any of its more significant aspects. The Commission should clarify that it is applying this standard from the standpoint of a reasonably efficient CLEC and that there is no danger of undermining subsidized ILEC retail rates if UNE rates are set properly under the Commission's rules. Further, the Commission should re-adopt its route-by-route and capacity-based applications of the impairment standard.

CompTel submits that the Commission should establish a presumption in favor of impairment for all high-capacity loops and transport. The reason is that the interstate access market has been almost totally devoid of new competitive entry despite the constantly rising rates and lush profit margins being earned today by the ILECs on their Special Access services. These are theoretically ideal conditions for new entry, yet none has occurred due to high barriers to entry. The ILECs have been particularly successfully in eliminating all addressable demand from the wholesale access market through anti-competitive lock-up provisions in their Special Access tariffs. The ILECs understand that if there are no wholesale customers available, no CLECs are likely to enter the wholesale access market. Until there is meaningful addressable demand in the wholesale access market, the Commission should presume that CLECs are impaired for all high-capacity loops and transport UNEs.

The Commission should address the Court's concern that the Commission has improperly excluded Special Access services from its impairment analysis. CompTel urges the Commission to re-adopt its policy against considering such services as relevant to a finding of non-impairment. The current Federal regulatory regime is one where the Commission does not rigorously regulate Special Access rates, and ILECs enjoy virtually complete pricing freedom under the 1999 *Pricing Flexibility Decision*. Nor does the Commission regulate the quality of Special Access services, as its 2001 proposal to adopt performance metrics lies dormant. In this regime, it would kill competition to permit the ILECs to manipulate Special Access rates and service quality to fluctuate between "impairment" and "non-impairment." Congress chose to base the promise of local competition on an unbundled network element regime, not a regulated Special Access regime, and the Commission should implement that approach by continuing to prohibit Special Access rates from playing any role in a finding of non-impairment.

Wholly apart from CompTel's proposal that the Commission adopt a presumption in favor of impairment for all high-capacity loops and transport, the record evidence demonstrates conclusively that CLECs are impaired without access to (i) ILEC-supplied DS-1 loops and transport; and (ii) ILEC-supplied DS-3 loops and transport according to the standards established in the *TRO* (*i.e.,* three DS-3 loops and 12 DS-3 transport facilities).

In addition, it is critical that the Commission re-adopt dark fiber loops and transport facilities as mandatory UNEs under Section 251. CompTel proposes that the Commission adopt a broader definition of the "dark fiber" UNE so that it can fully realize its pro-competitive potential by being more than merely a subset of the "loop" and "transport" UNEs.

CompTel also requests that the Commission adopt a meaningful transition plan for loop and transport UNEs in the event any such UNEs are de-listed. In particular, it is critical to make sure that CLECs may continue to enjoy true UNE rates for these functionalities until they have had a meaningful opportunity to migrate their traffic to alternative facilities or build their own facilities to carry this traffic. The Commission should require ILECs and CLECs to negotiate a suitable transition plan or, if such an agreement cannot be reached, establish a procedure for this issue to be resolved by state PUCs.

With respect to local switching, CompTel urges the Commission to find that CLECs are impaired on a nationwide basis without access to ILEC-supplied local switching. There is essentially no wholesale market today for local switching, and self-deployment is economically infeasible except with the possible exception of the highest-volume central offices where OCn facilities can be implemented. In the event the Commission determines to de-list local switching in whole or in part, the Commission should carefully establish a transition plan, based on the plan it adopted in the *TRO*, to ensure an orderly transition process that fully protects the ability of UNE-P carriers to continue competing in the marketplace and the rights of consumers to enjoy cost-based local telephone services.

II. THE IMPAIRMENT STANDARD

The Commission's Section 251(d) impairment analysis in the *TRO* — both the standard and the rules for applying it — is well-founded and should be retained on remand. With only two criticisms, the Court of Appeals approved the *TRO*'s implementation of the *USTA I* mandate as "explicitly and plausibly" explaining the nexus between today's network and competitive need. 359 F.3d at 571. The Court also reviewed favorably the Commission's "granular" application of the impairment standard, particularly the concept of "route-by-route" analysis. 359 F.3d at 574-75. Thus, the Commission should retain the vast bulk of the *TRO*'s impairment structure, providing only minor modifications and a slightly more detailed rationale, in response to *USTA II*.

A. *USTA II* Did Not Reject the *TRO* Impairment Standard Outright, and Thus That Standard Should Be Retained With Only Minor Modifications

The D.C. Circuit's discussion of impairment in *USTA II* demonstrates that the *TRO* largely got it right. *See* 359 F.3d at 571-73. The Court found that the Commission had properly implemented the Court's holding in *USTA I*, and rejected most of the ILECs' criticism of the *TRO* impairment standard. The Commission need not make any significant modifications to the *TRO* impairment standard in order to respond fully to the Court's concerns.

The *TRO* held that CLECs are "impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic." *TRO* ¶ 84. A "barrier to entry" in this sense is a function of five factors: (1) economies of scale; (2) presence of sunk costs; (3) the concept of "first-mover advantage"; (4) incumbent "absolute cost advantages"; and (5) "technical or operational barriers … within the ILEC's control." *Id.* ¶¶ 87-91. The *USTA II* Court praised this 5-factor construct because it "explicitly and plausibly connects" the "impairment inquiry to natural monopoly characteristics." *USTA II*, 359 F.3d at 571. With this "barrier to entry" analysis, the Commission "has clarified that only costs related to structural impediments to competition are relevant to the impairment analysis." *Id.* at 572. The Court found this "an improvement over the Commission's past efforts," *id.*, and required further explanation of only two selected aspects of the *TRO* standard. *Id.* at 572-73.

1. Uneconomic Entry

In response to the portion of the impairment standard addressing uneconomic entry into the market, the Court asked the Commission to address more thoroughly the type of CLEC whose entry would be examined under this standard. *USTA II*, 359 F.3d at 572. That is, to which type of carrier will the requesting CLEC be compared in order to determine whether it is impaired? This question is easily resolved based on the record and the *TRO* itself.[1]

Section 251 requires that an element be unbundled if "the failure to provide access to such network element would impair the ability of ***the telecommunications carrier seeking access*** to provide the services that it seeks to offer."[2] Congress thus made clear that the CLEC's desire for UNEs to facilitate entry into the market should be judged based on the services the CLEC desires to provide. In response to the Court's concern for more specific guidance on applying the impairment standard to specific CLECs, *see* 359 F.3d at 572, CompTel suggests that the most plausible and workable criterion is a "reasonably efficient CLEC." In fact, given the Commission's establishment of an impairment standard designed to encourage economic entry, *TRO* ¶ 517, CompTel submits that a "reasonably efficient CLEC" standard is already implicit in the *TRO*.

In general, a reasonably efficient CLEC should be one that has sufficient resources to enter the market, that plans to enter the market in a manner that enables it to recoup its investment over time, and that plans to develop service offerings to meet anticipated current and future demand. A useful analogy would be antitrust merger analysis, in which combinations are more likely to be approved in a market that may expect a timely, likely, and sufficient new entrant.[3] Timely, likely, and sufficient new entry ensures that "[a] merger is not likely to create or enhance market power or to facilitate its exercise." *Id.* § 3.0. This concept can be a useful tool in applying the Section 251(d) impairment standard, because a CLEC that can efficiently

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1 The Court accepted by concept of "uneconomic entry" as a factor implementing the "at a minimum" language of Section 251(d), holding that the Commission's discretion to consider certain factors in addition to impairment comports with the statute. 359 F.3d at 572.

2 47 U.S.C. § 251(d)(2)(B) (emphasis added).

3 Dept. of Justice Horizontal Merger Guidelines §§ 3.0 – 3.4 (Apr. 8, 1997).

enter the market in a timely, likely, sufficient manner without the use of ILEC-supplied UNEs, can be said with confidence to not be "impaired" without access to UNEs. On the other hand, if that CLEC requires UNEs in order to enter and remain in the market, then impairment is present.

Merger analysis measures likelihood of entry as a function of minimum viable scale ("MVS"). MVS is defined to be the minimum amount of sales revenue that would enable a new entrant to maintain a market presence without sustaining continued losses, and requiring ongoing capital infusions. Specifically, the Guidelines define MVS as the scale at which average costs equal average revenues. Merger Guidelines, § 3.3. If a new entrant could not secure MVS at pre-merger prices, then post-merger new entry is unlikely. Again, this is an apt analysis for Section 251(d) impairment, in that CLECs would be unlikely to enter a market where they could not achieve minimum viable scale based on prevailing retail rates.[4] The Department of Justice typically applies a two-year deadline to determine whether meaningful new entry is likely to be timely. *Id.* § 3.2. CompTel therefore suggests that the Commission further refine the notion of "uneconomic entry" to refer to whether a reasonably efficient CLEC could achieve MVS in two years at prevailing retail, or wholesale prices (depending on the market to be entered). If a reasonably efficient CLEC could not do so, then impairment is present in that market and cost-based unbundling must be provided.

For purposes of this analysis, CompTel submits it would be reasonable to use a CLEC's ability to become cash flow neutral as a proxy for MVS. Similarly, the prior experience of other entrants would be relevant when assessing comparative market similarity where entry has occurred in one market but not in an adjacent market with identical characteristics. In these

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[4] The ILECs' argument that entry decisions may be skewed due to differences in whether prevailing MVS rates are UNE rates or special access rates is of no consequence. Efficient entrants will base entry decisions on what they perceive to be the long run variable costs of the incumbent.

cases, the Commission's prior entry barriers analysis could properly explain that it may have been the case that the facilities-based entrant on one route did not reach minimum viable scale, and may have undergone a financial restructuring subsequent to its non-UNE-based entry. In a case like this, the correct inference for an adjacent market with no fiber-based entry is that the barriers to entry were never overcome by the first entrant. The facilities that may still be operational would have been the result of a one-time wealth transfer from initial investors to subsequent investors, an event unlikely to be repeated in the adjacent market.

By employing a "reasonably efficient CLEC" standard, whose characteristics are borrowed from Merger Guideline analysis, the Commission should fully address the *USTA II* Court's concerns that impairment must hinge on "concrete" analysis, 290 F.3d at 425, that "explicitly and plausibly" connects impairment to the real telecommunications market operating today. 359 F.3d at 571. CompTel therefore recommends that the Commission revise the impairment standard to state that CLECs are "impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic for a reasonably efficient CLEC."

2. UNE Rates vis-à-vis Below-Cost Service Rates

The *TRO*, in response to *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (*"USTA I")*, employed an impairment standard for switching that included consideration of whether entry "is impeded where rates are 'below cost'" due to "implicit support flows that have been incorporated into retail rates." *TRO* ¶ 518. The *USTA II* Court did not reject the Commission's analysis, but urged the Commission to conduct a more thorough examination of the possibility that low UNE rates could facilitate unfair CLEC competition against below-cost ILEC retail services. 359 F.3d at 573. CompTel assumes that the Court, as it was required to do, was referring to ILEC retail services offered at rates below the ILECs' forward-looking economic costs. Finding that unbundling in such areas might "cut further into ILEC revenues," the Court of Appeals instructed the FCC further "to evaluate the probable consequences of its approach." *Id.*

First, it is unclear from this concern whether any situation exists where an ILEC's retail rates are below cost. If the ILECs cannot point to any situations with specificity, the FCC need not look further. However, the putative problem identified by the Court – namely, a situation where TELRIC rates are so low that a CLEC can profitably provide UNE-based retail services that undercut the ILEC's below-cost retail services – can realistically occur only in situations where the state PUC has pegged TELRIC rates to be lower than the ILEC's subsidized retail rates. Assuming, *arguendo*, there is an instance where the ILEC can demonstrate below-cost retail prices, the ILEC should still be adequately compensated for the UNEs it provides because state PUCs establish TELRIC rates to fully reflect the ILECs' forward-looking economic costs, including a reasonable profit. Hence, UNE rates will fall below an ILEC's subsidized, below-cost retail rates for the same or similar functionality only when a state PUC improperly establishes the TELRIC rates. (If the state PUC properly sets the TELRIC rates and they are below the ILEC's retail rates, this shows that the ILEC's retail rates are not "subsidized" in an economic sense, despite what the ILECs might contend.) The Commission should address the Court's concern by making clear that state PUCs may not deliberately prescribe TELRIC rates to undercut ILEC retail services offering the same functionality at rates that are below the ILEC's forward-looking economic costs.

The Commission should also remain mindful that the Supreme Court blessed the notion that the 1996 Act was intended to put ILEC revenues at risk, including those from subsidized retail services. It affirmed TELRIC on the fundamental ground that "Congress passed a rate-setting statute with the aim not just to balance interests between sellers and buyers, but to reorganize markets by rendering regulated utilities' monopolies vulnerable to interlopers[.]"[5] Accordingly, concerns over "cutting further into" ILEC profit should not be overstated, particularly in the absence of any probative evidence showing that specific ILEC retail rates are "subsidized" rates in the economic sense.

2. The Commission adequately considered "intermodal alternatives."

The *USTA II* Court did not quarrel with the Commission's consideration of intermodal alternatives as required by *USTA I*. 359 F.3d at 572-73. Indeed, the Court rejected ILEC arguments that the Commission "unlawfully exclude[d]" intermodal consideration, finding that the Commission "expressly stated that such alternatives are to be considered when evaluating impairment." *Id.* at 572. The Court stated that it would not presume to tell the Commission what "weight" to assign these alternatives, *id.*, as indeed it could not.[6]

On this point, CompTel wishes to emphasize that the Commission's consideration of intermodal alternatives must draw sensible analogies between different types of facilities; it must be an "apples-to-apples" comparison. This caution is required given the very nature of what an "intermodal alternative" is:

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5 *Verizon Communications, Inc. v. FCC*, 122 S. Ct. 1646, 1661 (2002).

6 *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (Supreme Court is "not empowered to substitute its judgment for that of the agency"); *Computer and Commun. Ind. Ass'n v. FCC*, 693 F.2d 198, 218 (D.C. Cir. 1982) (affirming *Computer II*).

> By "intermodal," we refer generally to facilities or technologies other than those found in traditional telephone networks. These include, for example, traditional or new cable plant, wireless technologies (satellite, mobile, and fixed), power line (electric grid) technologies, or other technologies not rooted in traditional telephone networks.

TRO ¶ 67 n.325. When the Commission is considering intermodal alternatives that heretofore have not functioned, and do not function today, as meaningful substitutes for providing switched telephony services, such alternatives have limited relevance to the impairment inquiry. A facility should be considered an intermodal alternative only if it is truly comparable to the ILEC-supplied functionality in the nature, quality, cost and usefulness of services it can support.

Most importantly, a line must be drawn between basic and advanced services with respect to substituting non-PSTN facilities for ILEC facilities. That is, POTS-supporting facilities should be considered in a distinct group while data-supporting facilities should be considered as another group. Facilities supporting both basic and advanced services would appropriately be considered in both groups. This bifurcated approach ensures that the Commission adheres to its commitment to a "more granular" analysis that includes "such factors as specific services[.]" *TRO* ¶ 118. It moreover protects competition in each of these telecommunications sub-markets by not improperly preventing a voice carrier from obtaining POTS-related functionalities, or a data service provider from obtaining facilities to support data services. With these considerations, the Commission's intermodal considerations will best comport with the impairment analysis approved by *USTA II.*

Lastly, CompTel wishes to underscore its position that retail wireless services are not yet a sufficient substitute for wireline functionalities to drive a finding of non-impairment for any ILEC-supplied network element. Certainly, the ILECs have not supplied the necessary record evidence to demonstrate that CLECs are not impaired with respect to a particular network element due to the putative availability of wireless functionalities.

B. The Commission's "Granular" Application of the Impairment Standard Remains Sound

The *USTA II* Court implicitly approved the Commission's "granular" application of impairment as a proper response to *USTA I*. *See* 290 F.3d at 426 (Section 251(d) requires "a more nuanced concept of impairment than is reflected in findings such as the Commission's — detached from any specific markets or market categories.") Thus, the Commission's decision to "consider[] such factors as specific services, specific geographic locations, the different types and capacities of facilities, and customer and business considerations" is valid and should remain in place. *TRO* ¶ 118.

1. The Commission's route-by-route analysis is a proper construct for impairment.

In its review of the Commission's unbundling rule for dedicated transport, the *USTA II* Court began from the FCC's analytical basis that transport will be approached on a route-by-route basis. 359 F.3d at 575. The Court did not reject this approach, although it indicated that the Commission should thoroughly consider whether similar routes could be aggregated for purposes of determining impairment. *Id.*

CompTel urges the Commission to re-adopt the route-by-route approach adopted in the *TRO*. Not only did the *USTA II* Court not reject this approach, but a route-by-route analysis is the approach that is suggested by, and most consistent with, the Court's earlier decision in *USTA I*. As a practical matter, retention of that construct will allow the Commission to avail itself of the massive evidence already created by carriers — ILECs and CLECs alike —

to be used in the impairment inquiry. A significant departure from route-by-route analysis would render all of this evidence almost useless, and force carriers and the Commission to begin from scratch. Given the ambitious schedule that the Commission has set for a decision in this proceeding, the Commission lacks the ability to do a thorough impairment analysis except on a route-by-route basis.

Further, a route-by-route analysis is mandated by the unfortunate market reality that many existing CLEC facilities represent business plans that have not been successful. Hence, if two routes are roughly similar in all material characteristics, and CLECs have established facilities on one route, this does not mean that it is economically feasible today for CLECs to build facilities on the second route. The facilities on the first route may be the legacy of the failed business plan of CLECs who are no longer in business, or have been through substantial restructuring. In that situation, the existence of facilities on one route is not probative evidence that deployment is feasible on the second route. To the contrary, the fact that one or more CLECs tried and failed to establish a viable business by operating on a facilities basis on the first route is strong evidence that CLECs are impaired without access to ILEC-supplied UNEs on both routes. The Commission cannot adequately conduct the impairment analysis in a market characterized by a significant number of business failures if it abandons a route-by-route approach.

Finally, route-by-route analysis is valid because it most closely mirrors CLECs' own decision-making processes about facility deployment. As a theoretical matter, when considering whether and where to deploy facilities, CLECs consider the customers that will or may be served along various transmission paths *(i.e.,* the addressable demand) and compare the potential resulting revenues to the costs of deployment. In either event, as a practical matter, competitive carriers no longer build to capture speculative demand, but only build where real demand (revenue commitments by customers) has materialized. Paths that do not demonstrate cost recoupment likely will not get deployed. Thus, applying the impairment standard — which, as CompTel suggests above, should focus on whether a reasonably efficient CLEC would require the element in order to provide its chosen services — on this same route-by-route basis creates an appropriate nexus between CLEC need and real economic necessity. *See* 359 F.3d at 571.

2. Capacity considerations are appropriate in applying the impairment standard.

The D.C. Circuit did not opine on the Commission's decision to analyze transmission facilities based on their capacity. The Commission's decision to conduct a separate impairment analysis for different capacity increments is thus presumptively permissible under Section 251(d) and should be retained. *See TRO* ¶¶ 311-327, ¶¶ 380-393 (transport). Apart from being consistent with the *USTA II* decision, capacity-based impairment analysis is appropriate due to the different economic considerations that apply to different facilities. According to the Commission's *TRO* rationale, which the ILECs did not challenge on appeal, lower-capacity facilities carry a greater risk of stranded costs — they serve areas having fewer, or less lucrative, customers. Thus, DS-1 loops were retained as mandatory UNEs under Section 251(d) while OCn loops were not. *Id.* ¶¶ 315, 326. CompTel believes that capacity-based impairment considerations should accordingly be retained in this proceeding as being a sound method for proving the close unbundling scrutiny that the *USTA* panels demanded.

III. UNBUNDLING ANALYSIS FOR ENTERPRISE LOOPS AND DEDICATED TRANSPORT

The 1996 Act was adopted to promote competition not only in the retail local telecommunications market, but also in the wholesale exchange access market. *E.g., TRO* ¶ 139; *Local Competition Order*, 11 FCC Rcd 15499, 15506 (1996). Although the Commission decided not to make the existence of a functioning wholesale access market a precondition for a finding of non-impairment, CompTel strongly recommends that the Commission establish as a primary goal the creation of the Federal policies necessary to facilitate a workably competitive wholesale access market. In so doing, the Commission should make it clear that the absence of a functioning wholesale access market is a probative factor in the impairment inquiry, and the Commission should become pro-active in eliminating the anti-competitive activities of the ILECs, including the so-called "lock-up" Special Access tariff provisions, which have eliminated virtually all addressable demand in the interstate access market. Competitors will not enter the wholesale market if there are no wholesale customers available to be served. Moreover, only after the anticompetitive restraints on access providers have been removed can anyone discern addressable markets through objective criteria (*e.g.*, number of access lines per office) Once ILEC-imposed barriers to efficient entry have been removed from the wholesale access market, the Commission will have a more valid market setting for the type of impairment inquiries that it conducted in the *TRO* and that it proposes to conduct in this proceeding.

A. Special Access Market Conditions Demonstrate That CLECs Are Presumptively Impaired Without Access To ILEC-Supplied High-Capacity Loops And Transport

The Commission has recognized many times that actual marketplace conditions are the best evidence on impairment. *E.g., TRO* ¶ 93. Based on current market conditions for

Special Access services, the Commission should find that all requesting carriers are presumptively impaired for all high-capacity loop and transport UNEs. The ILECs are classified as dominant carriers by the Commission based on their undisputed market power over exchange access services. They are classified as dominant carriers by all state public utility commissions for the same reason. Measured by access to business premises, the ILECs control 98% of the access market nationwide,[7] and they price their services at usurious rates (even when offered at a "discount") that are orders of magnitude higher than their underlying forward-looking costs. CLECs have direct access to only a tiny percentage of buildings nationwide, which makes retail business consumers, as well as carrier customers like IXCs, CMRS providers, ISPs and CLECs who seek to serve them, almost completely reliant on the ILECs' Special Access services where UNEs are not available.[8] The ILECs' profit margins on their interstate Special Access services average an astounding 43.7% based on their FCC-filed ARMIS reports.[9] The ILECs extract $15 million _per day_ from U.S. consumers in above-cost (*i.e.,* monopoly) profits on Special Access services.[10] One would think that economic profits of this size would create ideal entry conditions for would-be access competitors, yet there has been essentially no recent new entry by CLECs into the wholesale access market. The lack of any significant entry despite ideal conditions for new entry is conclusive proof that the ILECs have erected such high entry barriers around the

7 *See* Economics and Technology, Inc., "Competition in Access Markets: Reality or Illusion – A Proposal For Regulating Uncertain Markets," Prepared for the Ad Hoc Telecommunications Users Committee, August 2004, at iv, 12, submitted on the record in CC Docket No. 03-173 (estimating that ILECs remain the sole source of connectivity at approximately 98% of all business premises in the United States today) ("*Special Access Study*") (copy attached).

8 *E.g., Special Access Study* at 16-17.

9 CompTel sponsored a study by MiCRA entitled "The Economic Impact of the Elimination of DS-1 Loops and Transport as Unbundled Network Elements" (copy attached), which shows that the elimination of DS-1 UNEs would cause CLECs to pay an additional $2 billion per year under Special Access rates, and that customer prices would rise by 25% with an aggregate decline in overall consumer welfare of $4.9 billion annually. The elimination of DS-1 UNEs would impose a particularly onerous burden on small and medium-sized businesses.

10 *E.g., Special Access Study* at iii, 7-8.

access market that they can engage in monopoly leveraging practices without any fear of encouraging competition.

The ILECs have leveraged their dominance of the interstate exchange access market, and severely constrained both future new entry, and expansion by existing wholesale carriers, through anti-competitive tariff provisions that lock-up virtually all existing and future demand for dedicated access services.[11] The ILECs have created a pricing structure in their Special Access tariffs whereby captive carrier-customers must obtain discounts in order to have any chance of offering retail service at competitive rates. A carrier-customer would have no opportunity to enter the retail market, or sustain its entry, if forced to pay the abusive month-to-month Special Access rates charged by the ILECs. However, in order to obtain the critical discounts, the carrier-customer often must commit to send 90% or more of its traffic to the ILEC, and the monetary penalties for violating this commitment are severe. In some cases, the ILECs have pursued explicit requirements that prevent these carrier-customers from using UNEs for their access traffic or building new facilities to carry their own traffic. Particularly when carrier-customers face declining traffic volumes and revenue streams – which is commonplace in the competitive industry today – these tariff provisions effectively wall-off the access market from new competitive entry. By contrast, ILEC affiliates are in the cat-bird's seat from a competitive standpoint because they are able to provide retail services based on their underlying economic costs, and any "penalties" they may pay are a wash from the ILEC's corporate perspective.

Indeed, this strategy has been so successful that the ILECs are pursuing a similar strategy in their post-*USTA II* "commercial agreements" with CLECs. For example, SBC's

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[11] *See* AT&T Corporation v. BellSouth Telecommunications, Inc., Formal Complaint, Filed at FCC on July 1, 2004 (documenting lock-up provisions implemented by BellSouth). *See also* Declaration of Michael D. Pelcovitz on Behalf of WorldCom, Inc., filed as attachment to Reply Comments of WorldCom, Inc., filed Jan. 23, 2003 in RM No. 10593 ("Pelcovitz Declaration") (copy attached).

agreement with Sage Telecom for a replacement UNE-P product requires Sage to use SBC's network "to fulfill all of its retail and wholesale requirements in the provision of wireline local exchange service" and prohibits Sage from providing its own switching or using any wholesale service offering provided by a non-SBC entity that uses basic analog switching or a similar circuit switching capability.[12]

Simply put, the ILECs have constructed and implemented tariff provisions that completely eliminate any possible addressable market for a would-be new access entrant. The ILECs know that their restrictive tariff covenants are successful in eliminating virtually all the demand a CLEC might possibly serve, and, therefore, the CLEC will not be able to justify entering the access market. The data show that the ILECs' plan has worked.

CompTel wishes to underscore that, while it continues to support the impairment line drawn by the Commission in the *TRO* at 3 DS3s for high-capacity loops, and 12 DS3s for high-capacity interoffice transport, it is easy to see how CLECs dependent on special access could still be impaired for higher-volume demand as the result of the ILECs' anticompetitive special access term contracts. For example, even if a CLEC has the traffic volume, as well as the scale and scope economies, to justify building its own facilities in a portion of an ILEC's region, the CLEC cannot self-deploy facilities for its own traffic without considering whether it will lose its Special Access discounts on a region-wide basis. In particular, a CLEC who migrates any significant traffic to its own facilities could easily violate its 90% commitment, and it would be penalized by having to pay the ILECs' outlandish month-to-month rates on a region-wide basis. Hence, even if a CLEC is willing and able to build a high-capacity loop above 3 DS3s, or a dedicated transport facility above 12 DS3s, a CLEC currently dependent on the ILECs' Special

[12] *See* Private Commercial Agreement For Local Wholesale Complete Between Sage Telecom and SBC, at Section 1.3, filed in Michigan PSC Case No. U-14121 on May 18, 2004.

Access services may decide not to do so in order to avoid losing its Special Access pricing discounts.

Wholly apart from the restrictive covenants in the ILECs' Special Access tariffs, a CLEC's ability to profitably deploy wholesale access facilities is extremely limited by the ILECs' Special Access pricing strategies. The reason is that CLECs typically can justify the initial costs of entering the wholesale access market only in compact geographic regions, while the ILECs are the only ubiquitous provider of access services through the entire region. As economists have explained to the Commission in other proceedings, a CLEC who is able to offer access facilities in a specific geographic location at a lower price compared to the ILEC is vulnerable to the ILEC's decision to offer a smaller region-wide discount to subscribers.[13] In that case, in order to make it economically worthwhile for an end-user subscriber to migrate its traffic to the CLEC over a portion of the region, the CLEC would have to offer a price that (i) beats the ILEC's price in the geographic location where the CLEC builds facilities; and (ii) compensates the subscriber for the ILEC discount it is losing in the rest of the ILEC's region. Given the narrow margins for CLECs in the wholesale telecommunications business today, such a pricing strategy by the ILECs limits, the situations under which a CLEC can justify new entry.

Because of strategic anti-competitive conduct by the ILECs, competitors cannot enter the wholesale market even when the incumbent monopolist has grossly excessive rates and nearly unheard-of profit margins, and many times, even when the CLECs have sufficient traffic volume and economies of scale and scope to justify self-deployment. Thus, on this evidence alone, it is clear that the ILECs have created a market situation that requires the Commission to establish a presumption that all requesting carriers are impaired without access to high-capacity

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[13] *E.g., id.*

loop and transport UNEs. The Commission should place these UNEs on the mandatory Section 251 list unless the ILECs present convincing evidence on a location-by-location basis (for loops) or a route-by-route basis (for transport) that there is no impairment. At a minimum, the FCC should establish a presumption that CLECs are impaired in every area where the ILEC has obtained Phase II pricing flexibility under the Commission's 1999 *Pricing Flexibility Decision*.[14]

The ILECs' contention that the CLECs' dependence on Special Access services today shows that competition can exist without UNEs is nonsense. The ILECs have competition on a leash (and a short one at that). There is no new wholesale entry into the market today, and the Special Access-based retail competition that exists today is synthetic competition because, with few exceptions, it exists at the pleasure of the ILECs. While regrettable for both consumers and competitors, the Commission's failure to rigorously regulate the ILECs' monopoly Special Access services since 1999 has at least served to throw open the blinds on this market segment to reveal the full extent to which the ILECs are able to pick and choose which competitors will survive and in which geographic locations they will operate. Local competition is not alive and well in the United States, and new facilities-based wireline entry at both the retail and wholesale level has all but completely ceased.

B. Special Access Market Conditions Cannot Support a Finding of Non-Impairment

The *USTA II* Court required the Commission to consider more thoroughly the extent to which the ILECs' Special Access offerings could support a finding of non-impairment for high-capacity loops and transport UNEs. 359 F.3d at 575-77. In CompTel's view, it is important to note that Special Access market conditions (in particular, the absence of any new

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14 *See Access Charge Reform*, 14 FCC Rcd 14221 (1999) ("*Pricing Flexibility Decision*").

entry despite theoretically ideal entry conditions) are plainly relevant to a finding of *impairment*. It is only with respect to a finding of *non-impairment* where the Commission should reiterate that Special Access services are not relevant. CompTel submits that the Commission should respond fully to the concerns raised by the Court, and that its response should reiterate the previous policy against considering Special Access services as a basis for a non-impairment finding.

Initially, it should be emphasized that the Court did not require the Commission to reject its previous policy against considering Special Access services when making a finding of non-impairment. Rather, the Court raised a number of specific issues in the context of CMRS providers which the TRO did not analyze in sufficient detail to satisfy the Court that the Commission had engaged in reasoned decision-making. Unfortunately, the Court was not privy to the wealth of record evidence developed in numerous proceedings, which provide compelling support for the Commission's pre-existing policy. The Court's statements that "market evidence" shows Special Access services can support competition, 359 F.3d at 576, and that no one has claimed the ILECs have the ability to raise Special Access rates to thwart competitive entry, *id.*, are simply incorrect. The Commission should address this issue in detail so that the Court is aware that the empirical basis of its assumptions is illusory.

As demonstrated above, competitive entry based on Special Access services is virtually non-existent today, and Special Access-based competitive market conditions are on life-support as bankruptcies cascade and access to capital for CLECs is difficult to non-existent. Moreover, the ILECs have eliminated virtually all addressable access demand in the marketplace through anti-competitive "lock-up" provisions in their Special Access tariffs. Further, the ILECs' Special Access rates have soared after the FCC deregulated Special Access services in the 1999 *Pricing Flexibility Decision*, and ILECs now earn supra-competitive rates of return on